Supreme Court, U.S.
FILED
No. 01 770 NOV - 1 2001
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

LEONARDO R. SANTANA-MADERA,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JEREMY G. EPSTEIN
Counsel of Record
KAREN S. HART
OLAV A. HAAZEN
SHEARMAN & STERLING
599 Lexington Avenue
New York, New York 10022
(212) 848-4000

Attorneys for Petitioner
Leonardo R. Santana-Madera

November 1, 2001

75pp

QUESTIONS PRESENTED

1. Does *Apprendi v. New Jersey*, 530 U.S. 466 (2000), apply to the enhancement of penalties pursuant to the Sentencing Guidelines?

2. Does *Apprendi* apply retroactively to cases on collateral review?

LIST OF PARTIES

Petitioner Leonardo R. Santana-Madera is the only party seeking review of the judgment below.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	vi
OPINIONS AND ORDERS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
A. The Trial	3
1. The Testimony As To Drug Quantity	3
B. Sentencing Proceedings	3
C. Post-Sentencing Proceedings	4
REASONS FOR GRANTING THE WRIT	6
I. *APPRENDI* SHOULD APPLY TO THE ENHANCEMENT OF PENALTIES UNDER THE SENTENCING GUIDELINES	6

PAGE

A. A Majority of Courts Holds That *Apprendi* Does Not Apply To The Sentencing Guidelines 7

B. The Sixth And Ninth Circuits Adopt A Broader Approach To The Meaning of "Statutory Maximum" 8

C. *Apprendi* Should Be Applied to Drug Quantity And Other Enhancement Factors That Increase The Range Of Penalties To Which A Defendant Would Be Exposed Under The Sentencing Guidelines . 9

D. Santana-Madera's 27 Year Sentence Violated His Fifth and Sixth Amendment Rights..... 12

II. *APPRENDI* SHOULD BE RETROACTIVELY APPLIED 15

A. *Apprendi* Involves Substantive Law..... 15

B. Alternatively, *Apprendi* Is Within The *Teague* Exception 18

CONCLUSION..... 19

APPENDIX

PAGE

Santana-Madera v. United States, 260 F.3d 133 (2d Cir. 2001) 1A

Order of the United States Court of Appeals for the Second Circuit, dated May 4, 2000 ..... 15A

Order of the United States Court of Appeals for the Second Circuit, dated March 22, 2001 ..... 17A

Memorandum-Decision and Order of the United States District Court of the Northern District of New York, dated January 13, 1999 ..... 21A

Superseding Indictment, dated September 3, 1992 ..... 28A

21 U.S.C. § 841 (*excerpt*) 36A

21 U.S.C. § 846 ..... 43A

21 U.S.C. § 848 (*excerpt*) 44A

18 U.S.C. § 2 ..... 45A

TABLE OF AUTHORITIES

Cases:	PAGE
Adams v. Aiken, 41 F.3d 175 (4th Cir. 1994).....	19
Apprendi v. New Jersey, 530 U.S. 466 (2000) ...*passim*	
Bilzerian v. United States, 127 F.3d 237 (2d Cir. 1997), *cert. denied*, 527 U.S. 1021 (1999).....	16
Bousley v. United States, 523 U.S. 614 (1998)	16
Gates v. United States, 515 F.2d 73 (7th Cir. 1975).....	16
Humphrey v. Cain, 138 F.3d 552 (5th Cir. 1998).....	19
Jones v. Smith, 231 F.3d 1227 (9th Cir. 2000).....	16
McCoy v. United States, ___ F.3d ___, No. 00-16434, 2001 WL 1131653 (11th Cir. Sept. 25, 2001)	16
Mistretta v. United States, 488 U.S. 361 (1989)	10
Nutter v. White, 39 F.3d 1154 (11th Cir. 1994)	19
Richardson v. United States, 526 U.S. 813 (1999)	5
Rosario v. United States, No. 01-5788, 2001 WL 1006641 (S.D.N.Y. Aug. 30, 2001).....	17

PAGE

Santana-Madera v. United States, 260 F.3d 133 (2d Cir. 2001) ..... *passim*

Sawyer v. Smith, 497 U.S. 227 (1990) 18

Sullivan v. Louisiana, 508 U.S. 275 (1993) 18

Teague v. Lane, 489 U.S. 288 (1989) 16

United States v. Aguayo-Delgado, 220 F.3d 926 (8th Cir.), *cert. denied*, 531 U.S. 1026 (2000) 15

United States v. Buckland, 259 F.3d 1157, *reh'g granted*, ___ F.3d ___, No. 99-30285, 2001 WL 1091167 (9th Cir. Sept. 14, 2001) 8, 15

United States v. Caba, 241 F.3d 98 (1st Cir. 2001) 7

United States v. Clark, 260 F.3d 382 (5th Cir. 2001) 17

United States v. Eaton, 260 F.3d 1232 (10th Cir. 2001) 7

United States v. Garcia, 240 F.3d 180 (2d Cir.), *cert. denied*, 121 S. Ct. 1629 (2001) 7

United States v. Garcia-Guizar, 234 F.3d 483, *cert. denied*, 121 S. Ct. 1629 (2001) (9th Cir. 2001) 9

United States v. Gonzalez, 259 F.3d 355 (5th Cir. 2001) 13

United States v. Le, 256 F.3d 1229 (11th Cir. 2001) 7

PAGE

United States v. Mandanici, 205 F.3d 519 (2d Cir.), *cert. denied*, 531 U.S. 879 (2000) 16

United States v. McCulligan, 256 F.3d 97 (3d Cir. 2001) 14

United States v. McLeod, 251 F.3d 78 (2d Cir.), *cert. denied*, ___ S. Ct. ___, No. 01-5770, 2001 WL 991970 (Oct. 1, 2001)..... 7

United States v. Moss, 252 F.3d 993 (8th Cir. 2001) 15-16, 18-19

United States v. Nicholson, 231 F.3d 445 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 1244 (2001)..... 14

United States v. Nordby, 225 F.3d 1053 (9th Cir. 2000)..... 8

United States v. Ramirez, 242 F.3d 348 (6th Cir. 2001), *cert. denied*, 121 S. Ct. 1629 (2001)..... 9

United States v. Sanders, 247 F.3d 139 (4th Cir.), *petition for cert. filed*, (U.S. Oct. 9, 2001) (No. 01-6715) 16

United States v. Sheppard, 219 F.3d 766 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 1208 (2001)..... 17

United States v. Von Meshack, 225 F.3d 556 (5th Cir. 2000), *amended on reh'g*, 244 F.3d 367 (5th Cir.), *cert. denied*, ____ S. Ct. ____, No. 00-10499, 2001 WL 687052 (Oct. 1, 2001) 17

PAGE

In re Winship, 397 U.S. 358 (1970) 18

Witte v. United States, 515 U.S. 389 (1995) 10

Statutes

18 U.S.C. § 2 2

18 U.S.C. § 3551 9-10

18 U.S.C. § 3742 10

21 U.S.C. § 841(a) 2, 12

21 U.S.C. § 841(b) 8, 12

21 U.S.C. § 846 2

21 U.S.C. § 848 ..... 2-3, 14

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2255 1

U.S.S.G. § 2D1.1(c)(2) 4

U.S.S.G. § 2D1.1(c)(14) 12

U.S.S.G. § 2D1.1(a)(3) 12

U.S.S.G. § 2D1.2 4

U.S.S.G. § 3B1.1(a) 4

Leonardo R. Santana-Madera ("Santana-Madera") respectfully petitions this Court for a writ of certiorari to review the August 3, 2001 decision of the Second Circuit case upholding the denial of his motion for relief pursuant to 28 U.S.C. § 2255 by the United States District Court for the Northern District of New York.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals affirming the denial of Santana-Madera's 2255 motion is reported as *Santana-Madera v. United States*, 260 F.3d 133 (2d Cir. 2001), reproduced in the Appendix ("App.") at 1A. The Court of Appeals' order dated May 4, 2000, granting Santana-Madera's motion seeking, *inter alia*, a certificate of appealability is reproduced in the Appendix at 15A. The Court of Appeals' order dated March 22, 2001, granting Santana-Madera's motion for the expansion of the certificate of appealability is reproduced in the Appendix at 17A. The district court's order dated January 13, 1999, denying Santana-Madera's 2255 motion, is reproduced in the Appendix at 21A.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Second Circuit's decision affirming the district court's denial of Santana-Madera's 2255 motion was entered on August 3, 2001.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition is concerned with the interpretation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. This petition also involves the interpretation of 21 U.S.C. §§ 841 and 846.

STATEMENT OF THE CASE

On September 3, 1992, a grand jury returned an eleven count Superseding Indictment 92-CR-245 ("the Indictment"), charging Santana-Madera and certain co-defendants with one count of Conspiracy To Possess With Intent To Distribute Cocaine and Aiding and Abetting Each Other To Possess Cocaine in violation of 21 U.S.C. §§ 841(a)(1)[1] and 846,[2] and 18 U.S.C. § 2, and eight counts of Distributing and Possession With Intent To Distribute Cocaine in violation of 21 U.S.C. § 841(a)(1). The Indictment further charged Santana-Madera and one co-defendant with engaging in a Continuing Criminal Enterprise ("CCE") in violation of 21 U.S.C. § 848.[3]

---

[1] Section 841(a) provides, in relevant part, that "it shall be unlawful for any person knowingly or intentionally (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a).

[2] Section 846 provides, in relevant part: "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those described for the offense, the commission of which was the object of the attempt or conspiracy." 21 U.S.C. § 846.

[3] Section 848(c) provides, in relevant part: "For purposes of subsection (a) of [§ 848], a person is engaged in a continuing criminal enterprise if: (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony,

App. at 28A. On June 3, 1993, the jury found Santana-Madera guilty on all counts.[4]

A. The Trial

1. The Testimony As To Drug Quantity

According to testimony of co-conspirators, Santana-Madera transported cocaine, or caused it to be transported, for redistribution in Syracuse. A government witness testified that, from the end of 1991 until June of 1992, approximately every "week, ten days, sometimes a little longer," one kilo of cocaine was delivered to Santana-Madera's residence 419 South Alvord Street. But co-defendant Raphael Santana, who lived at that address, testified that, on average, "[h]alf a pound, a pound, and very rarely, a kilo" was brought in from Syracuse once a month or "very rarely, once a week." Certain testimony indicated that small amounts of drugs that were not sold but rather "given" to co-conspirators in return for favors or services.

An undercover investigator testified that, on nine separate occasions between May 6, 1992 and June 19, 1992, he purchased a total amount of 28 ounces of cocaine from Santana-Madera or others purporting to act for him.

B. Sentencing Proceedings

The District Court sentenced Santana-Madera to 324 months' imprisonment on Count 4 (possession with

---

and (2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and (B) from which such person obtains substantial income or resources." 21 U.S.C. § 848(c).

[4] Count 7 did not name Santana-Madera.

intent to distribute), Count 10 (possession with intent to distribute) and Count 11 (CCE) together, and 240 months on Count 2 (distribution and possession), Count 3 (distribution and possession), Count 5 (possession), Count 8 (distribution and possession) and Count 9 (distribution and possession) together, to be served concurrently. The District Court found Count 1 (conspiracy) to be a lesser included offense for sentencing purposes and combined it with Count 11 (CCE), imposing the sentence on Count 11 only.

The 324 months' sentence was based upon the District Court's findings—by a mere preponderance of the evidence—that Santana-Madera's participation in the conspiracy "involved at least 50 but less than 150 kilograms of cocaine." Following the Drug Quantity Table of the Sentencing Guidelines, this finding led to an offense level of 36. U.S.S.G. 2D1.1(c)(2). The District Court added an additional level based upon its finding that drugs were sold from a house located near an elementary school. Following U.S S.G. 3B1.1(a) and 2D1.2, the Court then added a further enhancement of four levels based upon Santana-Madera's supervisory role in the offense, which brought the "total offense level" to 41.

C. Post-Sentencing Proceedings

Santana-Madera appealed on October 18, 1993, and by order dated January 4, 1995, the United States Court of Appeals for the Second Circuit affirmed the conviction.

On July 2, 1998, Santana-Madera filed a motion for relief pursuant to 28 U.S.C. § 2255 with the Northern District of New York. This motion was denied by order dated January 19, 1999.

On February 26, 1999, Santana-Madera filed a Notice of Appeal, which the Second Circuit construed as a motion for a certificate of appealability. Following this

Court's decision in *Richardson v. United States*, 526 U.S. 813 (1999), by order dated May 4, 2000, the Second Circuit granted this motion limited to the following questions: (1) whether the decision in *Richardson* should be applied retroactively; (2) if so, whether trial counsel was ineffective for failing to request the jury instructions required by *Richardson* where the direct appeal was decided prior to the *Richardson* decision; and (3) if so, whether harmless error analysis is applicable such that *habeas* relief is not appropriate.

Following this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), on October 6, 2000, Santana-Madera moved the Second Circuit to expand the certificate of appealability previously granted. By order dated March 22, 2001, the Second Circuit granted this motion, allowing Santana-Madera to raise the issues (1) whether *Apprendi* applies retroactively and (2) if so, whether there was an *Apprendi* error in this case.

By order dated August 3, 2001, the Second Circuit affirmed the district court's denial of 2255 relief. *Santana-Madera v. United States*, 260 F.3d 133 (2d Cir. 2001). The Second Circuit held that *Apprendi* is inapplicable to Sentencing Guidelines calculations that do not result in a sentence on a single count above the statutory maximum for that count. *Id.* at 141. Accordingly, it found that although the district court could have imposed only a sentence of 240 months on Counts 4 and 10, no *Apprendi* error occurred because Santana-Madera's 324 months' sentence was less than the maximum sentence provided for by the CCE statute. The Court further held that the district court's failure to properly instruct the jury on the CCE count was harmless error.

REASONS FOR GRANTING THE WRIT

I

APPRENDI SHOULD APPLY TO THE ENHANCEMENT OF PENALTIES UNDER THE SENTENCING GUIDELINES

In *Apprendi*, this Court held that, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the *prescribed statutory maximum* must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. However, this Court further held that it is "unconstitutional for a legislature to remove from the jury the assessment of *facts that increase the prescribed range of penalties* to which a criminal defendant is exposed," and that the relevant inquiry is whether this finding "expose[s] the defendant to a *greater punishment than that authorized by the jury's guilty verdict.*" *Id.* at 490, 494 (emphasis added). *See also id.* at 499 (the Constitution establishes "the right to have a jury determine those facts that determine the maximum sentence the law allows") (Scalia, J., concurring).

This divergent language has created a conflict among the circuits regarding whether the "statutory maximum" within the meaning of *Apprendi* refers only to the penalties set forth in a prohibiting statute, or also to the maximum penalty prescribed by the Sentencing Guidelines. The *Apprendi* Court left these questions open. *See id.* at 523 n.11 (Thomas, J., concurring) (stating that it is "unnecessary to consider whether (and, if so, how) the rule regarding elements applies to the Sentencing Guidelines . . .").

A. A Majority Of Courts Holds That *Apprendi* Does Not Apply To The Sentencing Guidelines

The majority of circuits to consider the issue have limited the term "statutory maximum" to the maximum set forth in the relevant prohibiting statute and denied *Apprendi*'s application to the maximum penalties set by the Sentencing Guidelines. *See, e.g., United States v. Caba*, 241 F.3d 98, 101 (1st Cir. 2001) (stating that the Apprendi principle does not apply to Guideline computations increasing the sentence so long as the sentence actually imposed does not outstrip the statutory maximum); *United States v. Eaton*, 260 F.3d 1232, 1239 (10th Cir. 2001); *United States v. Le*, 256 F.3d 1229, 1240 (11th Cir. 2001).

Following this view, the Second Circuit has held that "*Apprendi* is inapplicable to Guidelines calculations that do not result in a sentence on a single count above the statutory maximum for that count." *Santana-Madera v. United States*, 260 F.3d 133, 141 (2d Cir. 2001) (quoting *United States v. McLeod*, 251 F.3d 78, 82 (2d Cir.), *cert. denied*, ___ S. Ct. ___, No. 01-5770, 2001 WL 991970, at *1 (Oct. 1, 2001)). *Accord United States v. Garcia*, 240 F.3d 180, 183 (2d Cir.), *cert. denied*, 121 S. Ct. 2615 (2001). Under the Second Circuit's approach, "statutory maximum" refers exclusively to the maximum penalty directly provided for by the prohibiting statute itself, *i.e.*, § 841(b). *Santana-Madera*, *id.* at 141 (holding *Apprendi* inapplicable because the sentence was not increased beyond the "*statutory* maximum sentence," even though "the district court's findings increased the sentence required by the Guidelines" (emphasis in original). Therefore, *Apprendi* does not alter a sentencing judge's authority to determine those facts relevant to selection of an appropriate sentence within this interpretation of the "statutory maximum." *Garcia*, 240 F.3d at 183.

B. The Sixth And Ninth Circuits Adopt A Broader Approach To The Meaning Of "Statutory Maximum"

Other circuits adopt a broader interpretation, which would support applying the *Apprendi* rule to the Sentencing Guidelines. For example, the Ninth Circuit has held that all sentencing enhancements that increase the prescribed range of penalties to which a defendant is exposed require a jury finding of guilty beyond a reasonable doubt. *United States v. Nordby*, 225 F.3d 1053 (9th Cir. Sept. 11, 2000) (the "prescribed statutory maximum" mentioned in *Apprendi* refers simply to the punishment to which the defendant is exposed solely under the facts found by the jury). In fact, following the reasoning of the *Apprendi* dissent, the Ninth Circuit has recently held the sentencing scheme under 841 (b)(1)(A) and (B) to be facially unconstitutional on the ground that it allows a judge to find drug quantity under a preponderance of the evidence standard where such finding has the potential of increasing the maximum sentence beyond that specified in 841 (b)(1)(C) for an unspecified amount of drugs. *United States v. Buckland*, 259 F.3d 1157, 1161 (9th Cir.), *reh'g granted*, ___ F.3d ___, No. 99-30285 WL 1091167 at *1 (9th Cir. Sept. 14, 2001) (noting that the *Apprendi* majority's 'reasoning strongly suggests that federal determinate-sentencing schemes . . . are not constitutional.'") (quotation omitted). *See also Apprendi*, 530 U.S. at 541 (O'Connor, J., dissenting) ("Under another reading of the Court's decision, it may mean only that the Constitution requires that a fact be submitted to a jury and proved beyond a reasonable doubt if it, as a formal matter, *increases* the range of punishment *beyond that which could legally be imposed absent that fact*.") (emphasis in original).

Similarly, the Sixth Circuit has repeatedly applied *Apprendi* to findings that raise the mandatory minimum sentence to which a criminal defendant is exposed. In applying *Apprendi* to such mandatory minimums, the Sixth Circuit concluded that "[a]ggravating factors, other than a prior conviction, that increase the penalty from a nonmandatory minimum sentence to a mandatory minimum sentence, or from a lesser to a greater minimum sentence, are now elements of the crime to be charged and proved." *United States v. Ramirez*, 242 F.3d 348, 351 (6th Cir. 2001), *cert. denied*, 121 S. Ct. 1629 (2001). *See also United States v. Garcia-Guizar*, 234 F.3d 483 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 1629 (2001) (assuming that *Apprendi* prohibits an increase of the prescribed statutory minimum penalty from no minimum penalty, based on the facts found by the jury, to a 10 year minimum, based on facts found by the judge).

C. *Apprendi* Should Be Applied To Drug Quantity And Other Enhancement Factors That Increase The Range Of Penalties To Which A Defendant Would Be Exposed Under The Sentencing Guidelines

The refusal by most courts of appeals to apply *Apprendi* to Guidelines sentences, when the ultimate sentence is not greater than the maximum in the prohibiting statute, is based upon a misperception of the term "statutory maximum" as used in *Apprendi*, and the constitutional principles underlying that decision.

The Sentencing Guidelines are a *statutory* scheme for sentencing. *See Apprendi*, 530 U.S. 466, 544 (O'Connor, J., dissenting). 18 U.S.C. § 3551 provides that, except in limited cases, a defendant who has been found guilty of an offense under any federal statute shall be sentenced in accordance with the Guidelines. The plain statutory language of 18 U.S.C. § 3551 makes the Guidelines

mandatory and, with certain limited exceptions, controlling. *Witte v. United States*, 515 U.S. 389, 411 (1995) (Stevens, J., dissenting) (the Guidelines are mandatory and a judge must sentence accordingly); *Mistretta v. United States*, 488 U.S. 361, 413, *aff'd*, 873 F.2d 1446 (8th Cir. 1989) (Scalia, J. dissenting) ("While the products of the Sentencing Commission's labors have been given the modest name 'Guidelines,' . . . they have the force and effect of laws, prescribing the sentences criminal defendants are to receive. A judge who disregards them will be reversed."); *Apprendi*, 530 U.S. at 523 n.11 (Thomas, J., concurring). *See also* 18 U.S.C. § 3742(a) and (b).

The approach that the Second Circuit adopted in *Santana-Madera* draws an arbitrary distinction between a maximum penalty directly provided for by the prohibiting statute and a maximum penalty under the Guidelines. If such a distinction were permitted to stand, legislatures would be allowed to immunize drug sentencing schemes against constitutional challenge by simply reversing the structure of the schemes, raising the statutory maximum, while making a judge's finding of limited drug quantities grounds for *lowering* the penalty. As Justice O'Connor noted in *Apprendi*, "[i]t is difficult to understand . . . why the Constitution would require a state legislature to follow such a meaningless and formalistic difference in drafting its criminal statutes." *Id.* at 541 (O'Connor, J., dissenting). In other words, if a legislature can, consistent with the Constitution, make precisely the same difference in punishment turn on the same facts by placing a properly worded maximum sentence in the offense-defining provision, then " 'no constitutional values are served by so formalistic an approach . . .' " *Id.* at 543 (quoting Jones). *See also id.* at 494 ("the relevant inquiry is one not of form, but of effect").

Rather, the actual constitutional principle underlying the Court's decision in *Apprendi* compels the conclusion that "any fact (other than prior conviction) that has the effect, *in real terms*, of increasing the maximum punishment beyond an otherwise applicable range must be submitted to a jury and proved beyond a reasonable doubt." *Id.* at 543-544 (emphasis in original); *id.* at 499 (Scalia, J., concurring) (the Constitution establishes "the right to have a jury determine those facts that determine the maximum sentence the law allows"); *id.* at 523 n.11 (Thomas, J., concurring) (discussing the potential application of *Apprendi* to the Sentencing Guidelines given that the Guidelines have the force and effect of laws); *see also id.* at 544 (O'Connor, J., dissenting) ("Justice Thomas essentially concedes that the rule outlined in his concurring opinion would require the invalidation of the Sentencing Guidelines").

The applicability of *Apprendi* to the Guidelines should be obvious. Where an indictment fails to specify the exact type and quantity of controlled substance, which largely determines the sentence, a defendant's due process and jury trial rights are violated. The fact that the criminal statute may specify a greater potential penalty should be irrelevant. The simple fact is that a defendant will be sentenced under no other scheme than the statutory scheme of the Guidelines. Where the jury found no quantity, the applicable Guidelines carry a "prescribed range of penalties" and set a specific maximum penalty, which constitutes the "maximum authorized by the jury's findings" within the meaning of *Apprendi*. It follows that any finding by a judge of a larger quantity then qualifies as a finding of "facts that increase the prescribed range of penalties to which a criminal defendant is exposed," leading to "a greater punishment than that authorized by the jury's guilty verdict" within the meaning of *Apprendi*. The only applicable "statutory maximum" to

be considered is the maximum set under the Guidelines scheme under which the defendant is actually being sentenced.

Accordingly, if a defendant, who is convicted of a particular offense based upon the facts alleged in the indictment, faces a specific sentencing range under the Guidelines, and that sentence is enhanced based upon facts such as drug quantity or the vicinity of an elementary school not alleged in the indictment, an *Apprendi* violation occurs.

D. Santana-Madera's 27 Year Sentence Violated His Fifth And Sixth Amendment Rights

In this case, the only sentence for the § 841 counts authorized under the facts as found by the jury was a sentence of not more than 27 months instead of 27 years. Section 841(b) provides that any person who violates § 841(a) shall be sentenced, in the case of a controlled substance in schedule I or II, "to a term of imprisonment of not more than 20 years." 21 U.S.C. § 841(b)(1)(C). Moreover, the applicable Sentencing Guidelines limit the range of the court's discretion drastically. Under the Guidelines every offense is assigned a base offense level, ranging from 1, the lightest sentence, to level 43, the heaviest sentence. Each offense level corresponds to a certain penalty range, depending on the defendant's criminal history. In the absence of any jury finding on drug quantity, the only Guideline applicable to an undetermined amount of cocaine is § 2D1.1, which provides that the sale of "[l]ess than 25 G of cocaine" corresponds to an offense level of 12. *See* U.S.S.G. § 2D1.1(c)(14). *See also* U.S.S.G. § 2D1.1(a)(3).[5]

---

[5] In his Objections to the Presentence Report, Santana-Madera admitted he distributed between 5 and 10 kilograms of cocaine. However, such evidence is irrelevant. *United States v. Gonzalez*, 259 F.3d 355, 361 n.3 (5th Cir. 2001) ("[b]ecause of the juris-

In the present case there has been no jury finding as to drug quantity or the sale of drugs in the vicinity of an elementary school. Accordingly, the base offense level should have been determined to be 12, the level for distributing an undetermined amount of cocaine. Four additional levels may have been legitimately added based upon Santana-Madera's supervisory role.[6] Because the district court determined Santana-Madera's criminal history category to be "1," Court of Appeals Joint apprendix ("C.A. App.") (Transcript of the Sentencing Proceedings) at A-262, the sentencing range for offense level 16 is 21 to 27 months, according to the Sentencing Table. Therefore, the only sentence under § 841 justifiable under the facts as found by the jury would be a sentence of *not more than 27 months*.

However, in this case, the judge found by a mere preponderance of the evidence a drug quantity of more than 50 but less than 150 kilograms of cocaine, corresponding to an offense level of 36. C.A. App. at 261. Finding further that drugs were sold in the vicinity of an elementary school, the judge added one level. *Id.* The judge further added four levels for the defendant's role as organizer. *Id.* at A-261-262. Thus, finding a base offense level of 37 and a total offense level of 41, the district court sentenced Santana-Madera to 324 months' imprisonment. *Id.* at A-262-263. Since the district court

---

dictional nature of the error, evidence adduced at trial supporting the drug quantity or stipulations made by the defendant as to the drug quantity are not relevant to our analysis of an *Apprendi* claim in which the indictment fails to allege drug quantity").

[6] The district court did not sentence Santana-Madera for the § 848 conviction separately, but instead merged Counts 4 (distributing cocaine), 10 (distributing cocaine) and 11 (CCE). Thus, the judge's findings on drug quantity and the vicinity of an elementary school, resulting in a base offense level of 37, were the basis of Santana-Madera's entire sentence of 324 months.

merged Counts 4, 10 and 11, it cannot be determined what portion of the 27 years must be allocated to Counts 4 and 10 and which portion to the CCE count.

The Second Circuit, while it acknowledged that "the district court could have imposed only a sentence of 240 months on counts 4 and 10," *Santana-Madera*, 260 F.3d at 136, nevertheless found no *Apprendi* violation when Santana-Madera was sentenced to *27 years* on these two § 841 counts because the maximum penalty for the CCE Court is life. *Id.* at 141. In other words, instead of applying the statutory maximum *for those counts*, the Second Circuit applied the maximum penalty of *another* prohibiting statute, *i.e.*, 21 U.S.C. § 848, applicable to *another* count, based solely on the fact that the district court happened to have merged the two § 841 counts with the § 848 count. *Id.* 136-137, 141.

It is clear, then, that, even under the Second Circuit's interpretation of the relevant "statutory maximum," Santana-Madera's sentence violated his Fifth and Sixth Amendment rights. The Second Circuit's reasoning contradicts this Court's explicit holding in *Apprendi*. *Apprendi*, 530 U.S. at 474 (stating that the constitutional question was only whether the 12-year sentence imposed *on a specific count* was permissible). *See also United States v. McCulligan*, 256 F.3d 97, 105 (3d Cir. 2001) (rejecting the argument that mistakes in determining the sentence on one count may be ignored so long as a greater sentence might have been imposed on another count); *United States v. Nicholson*, 231 F.3d 445 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 1244 (2001) (remanding for resentencing on marijuana distribution and conspiracy counts even though defendant received a life sentence on another crack distribution count).

The view of the majority and the Second Circuit that an aggravating factor such as drug quantity is only an

element of an offense that needs to be charged in the indictment and proven to a jury beyond a reasonable doubt if it raises the sentence above the maximum set by the prohibiting statute is untenable. *Buckland*, 259 F.3d at 1167 (stating that there is no "middle road, by which drug quantity is sometimes an element of the offense that must be proven to the jury beyond a reasonable doubt, and sometimes a sentencing factor that the judge can decide by a preponderance of the evidence"). To draw a distinction between enhancements above and below the maximum set by the prohibiting statute makes little sense from a prosecutorial perspective, for if the government wishes to seek penalties in excess of those applicable by virtue of the elements of the offense alone, then it must charge the facts giving rise to the increased sentence in the indictment and must prove those beyond a reasonable doubt. *United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir.), *cert. denied*, 531 U.S. 1026 (2000). As the Ninth Circuit recognized, the approach requiring drug quantity to be proven to the jury only if the resulting sentence is beyond the maximum set by the prohibiting statute, but allowing it to be decided by the judge if it is not, is unworkable; and, as a practical matter, the prosecutor will always have to submit drug quantity to the jury anyway. *Buckland*, 259 F.3d at 1167.

II

APPRENDI SHOULD BE RETROACTIVELY APPLIED

A. *Apprendi* Involves Substantive Law

A majority of courts that have considered the issue have held that *Apprendi* does not apply retroactively on collateral review. *See, e.g., United States v. Moss*, 252 F.3d 993, 998 (8th Cir. 2001) (the *Apprendi* rule does not reside "anywhere near that central core of fundamental

rules that are absolutely necessary to insure a fair trial"); *United States v. Sanders*, 247 F.3d 139, 146 (4th Cir.), *petition for cert. filed*, (U.S. Oct. 9, 2001) (No. 01-6715); *McCoy v. United States*, ___ F.3d ___, No. 00-6434, 2001 WL 1131653, at *8-9 (11th Cir. Sept. 25, 2001); *Jones v. Smith*, 231 F.3d 1227, 1238 (9th Cir. 2000).

Apprendi should be retroactively applied because it involves the substantive construction of a criminal statute. It is settled law that new rules of substantive criminal law that resolve a question as to the meaning of a criminal statute should be retroactively applied. *Bousley v. United States*, 523 U.S. 614 (1998) (stressing that the exception to the rule of retroactivity recognized in *Teague v. Lane*, 489 U.S. 288 (1989), applies only to procedural rules and is inapplicable to the situation in which this Court decides the meaning of a criminal statute enacted by Congress). *See also Bilzerian v. United States*, 127 F.3d 237, 242 (2d Cir. 1997) (courts "have repeatedly held that a substantive change in the law . . . is properly applied retroactively on collateral review"), *cert. denied*, 527 U.S. 1021 (1999); *United States v. Mandanici*, 205 F.3d 519, 525 (2d Cir.) ("a new rule of substantive criminal law is presumptively retroactive"), *cert. denied*, 531 U.S. 879 (2000); *Gates v. United States*, 515 F.2d 73, 78 (7th Cir. 1975) ("A statute does not mean one thing prior to the Supreme Court's interpretation and something entirely different afterwards").

At issue in *Apprendi* was whether the requirement of a "biased purpose to intimidate," which was part of the sentencing provisions of a New Jersey hate crime statute, should be treated as a sentencing factor, which the judge can find by a preponderance of the evidence, or as a substantive element that must be found by the jury beyond a reasonable doubt. *Apprendi*, 530 U.S. at

490, 495. Stating that "the relevant inquiry is one not of form, but of effect," *id.* at 494, the Court held that, when sentencing factors are used to enhance a sentence, they must be considered substantive elements of a separate, aggravated offense. *Id.* at 494 n.19 (holding that a sentence enhancement is the functional equivalent of an element of a greater offense, and "[i]ndeed, it fits squarely within the usual definition of an 'element' of the offense."). *See also id.* at 477-482. In so holding, the *Apprendi* Court redefined the meaning of sentencing enhancements in criminal statutes like the New Jersey statute *as substantive elements of the crime*. *United States v. Von Meshack*, 225 F.3d 556, 575 (5th Cir. 2000), *amended on reh'g*, 244 F.3d 367 (5th Cir.), *cert. denied*, ___ S. Ct. ___, No. 00-10499, 2001 WL 687052, at *1 (Oct. 1, 2001) ("The broad rule of constitutional law announced in *Apprendi* calls into question our prior rule that drug amount is not an element of a § 841 case"); *United States v. Sheppard*, 219 F.3d 766, 767 (8th Cir. 2000), *cert. denied*, 121 S. Ct. 1208 (2001) ("Based upon the Supreme Court's recent decision in *Apprendi v. New Jersey*, . . . we conclude that drug quantity must often be treated as an element of the offense under § 841") (citation omitted); *Rosario v. United States*, No. 01-5788, 2001 WL 1006641, at *3 (S.D.N.Y. Aug. 30, 2001) ("Since the *Apprendi* rule interprets the meaning of a multitude of criminal statutes . . . it is a substantive rule of law retroactively applicable to cases on collateral review"); *United States v. Clark*, 260 F.3d 382, 384-388 (5th Cir. 2001) (Parker, J., dissenting) (stating that *Apprendi*, even though it has both substantive and procedural components, announces a new substantive rule and must therefore be applied retroactively on collateral review). Thus, *Apprendi* implicates substantive law and applies retroactively.

B. Alternatively, *Apprendi* Is Within The *Teague* Exception

However, even if the rule in *Apprendi* is not deemed to be a rule of substantive law, it belongs to the category of "watershed rules of criminal procedure," which "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding," without which the likelihood of an accurate conviction is seriously diminished, and which are appropriate for retroactive application. *Sawyer v. Smith*, 497 U.S. 227, 241-42 (1990), (internal quotation marks and citations omitted); *Teague*, 489 U.S. at 311-313. Due process of law and the right to trial by jury, which entitle a criminal defendant to a jury determination that he is guilty beyond a reasonable doubt of every element of the crime with which he is charged, implicate fundamental fairness and are of surpassing importance. *Apprendi*, 530 U.S. at 476-77. *See also id.* at 524 (O'Connor, J., dissenting) ("Today, in what will surely be remembered as a watershed change in constitutional law, the Court imposes as a constitutional rule the principle it first identified in *Jones*"); *In re Winship*, 397 U.S. 358, 363 (1970) ("The [reasonable doubt] standard provides concrete substance for the presumption of innocence—that bedrock axiomatic and elementary principle whose enforcement lies at the foundation of the administration of our criminal law") (internal quotation marks omitted); *Sullivan v. Louisiana*, 508 U.S. 275, 277-278 (1993) (the jury verdict required by the Sixth Amendment right to trial by jury is a jury verdict of guilty beyond a reasonable doubt, and such right to trial by jury is "fundamental to the American scheme of justice") (citations omitted).

Accordingly, *Apprendi* must be applied retroactively. *United States v. Moss*, 252 F.3d 993, 1003-4 (8th Cir. 2001) (Arnold, J., dissenting) (stating that *Apprendi* applies retroactively because it "recognizes bedrock

procedures that are implicit in the concept of ordered liberty and that touch on the fundamental fairness of the trial"). *Cf. Humphrey v. Cain*, 138 F.3d 552, 553 (5th Cir. 1998) (adopting reasoning that denial of the right to a jury verdict beyond a reasonable doubt is so fundamental as to fall under the *Teague* exception); *Adams v. Aiken*, 41 F.3d 175, 179 (4th Cir. 1994); *Nutter v. White*, 39 F.3d 1154, 1158 (11th Cir. 1994) (improper reasonable doubt instruction undermines fundamental fairness of every trial and falls under the *Teague* exception).

CONCLUSION

For the foregoing reasons, Santana-Madera's petition for a writ of certiorari should be granted.

Respectfully submitted,

JEREMY G. EPSTEIN
Counsel of Record
KAREN S. HART
OLAV A. HAAZEN
SHEARMAN & STERLING
Attorneys for Petitioner
Leonardo R. Santana-Madera
599 Lexington Avenue
New York, New York 10022
(212) 848-4169

November 1, 2001

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2000

(Argued: May 4, 2001 Decided: August 3, 2001)

Docket No. 99-2125

LEONARDO R. SANTANA-MADERA,

Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Before:

MCLAUGHLIN, POOLER, *Circuit Judges*, and MARTIN, *District Judge.**

---

* The Honorable John S. Martin, Jr., United States District Judge for the Southern District of New York, sitting by designation.

Pursuant to an amended certificate of appealability issued by this Court, Petitioner appeals from an order of the United States District Court for the Northern District of New York (McCurn, *J.*) denying his petition for a writ of *habeas corpus*. AFFIRMED.

JEREMY G. EPSTEIN, Shearman & Sterling, New York, NY, (Karen S. Hart and Olav A. Haazen, on the brief) *for Petitioner-Appellant.*

ELIZABETH S. RIKER, Assistant United States Attorney, *for* Daniel J. French, United States Attorney for the Northern District of New York (John G. Duncan, on the brief), *for Respondent-Appellee.*

MCLAUGHLIN, *Circuit Judge*:

In this case, a convicted drug dealer invokes two recent Supreme Court decisions, *Richardson v. United States*, 526 U.S. 813 (1999), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000)—both of which were decided long after his convictions became final—in the hope of reversing his conviction for engaging in a continuing criminal enterprise ("CCE") and reducing his sentence of 324 months' imprisonment. Even though we conclude that the new rule announced in *Richardson* has retroactive application to the Petitioner's case, it is, nevertheless, an inadequate basis for upsetting his CCE conviction. And because the CCE conviction thus stands, whether or not *Apprendi* is to be retroactively applied

(an issue we leave for another day) we conclude that there was no *Apprendi* error in the district court's sentence in the instant case.

In September 1992, an indictment filed in the United States District Court for the Northern District of New York (McCurn, *J.*) charged Petitioner, Leonardo Santana-Madera, with conspiracy to distribute cocaine in violation of 21 U.S.C. § 846; eight substantive counts of cocaine distribution in violation of 21 U.S.C. § 841(a); and engaging in a continuing criminal enterprise ("CCE") in violation of 21 U.S.C. § 848. The government alleged that, from January 1986 to June 1992, Santana-Madera masterminded a huge cocaine distribution pipeline between New York City and Syracuse, New York.

Consistent with the traditional practice before *Apprendi*, the indictment did not allege the quantity of cocaine involved either for the individual distribution counts or the aggregate amount of the CCE. Furthermore, like nearly all pre-*Richardson* CCE indictments, Santana-Madera's indictment did not specify which offenses constituted the "continuing series of violations." The CCE count simply alleged that Santana-Madera organized or managed at least five other persons in connection with three or more of the nine federal drug law violations alleged in the indictment.

Having pled not guilty to all charges, Santana-Madera came to trial in 1993. In its jury charge, the district court issued the following instruction on the "continuing series of violations" element of the CCE offense:

> A continuing series of violations is three or more violations of the Federal Drug Laws committed over a definite period of time. These violations do not have to be convictions or separate counts in the indictment. They may be acts not mentioned in the indictment at all, as long as the Defendant had the

intent to violate the drug laws when he or she committed these acts.

Thus, the jury was not required to agree unanimously on which specific violations constituted the "continuing series." Under this instruction, if the jury unanimously agreed that Santana-Madera supervised five or more people in the commission of three or more violations of the federal drug laws—even if each juror had a different set of three violations in mind—the jury could convict Santana-Madera of the CCE charge. Santana-Madera's counsel did not object to this instruction or request other instructions.

The jury convicted Santana-Madera on all charges. At sentencing, the district court concluded that Santana-Madera's participation in the conspiracy involved at least 50, but less than 150, kilograms of cocaine. This finding (along with others not here relevant) yielded a sentencing range, under the Sentencing Guidelines, of 324 to 405 months' imprisonment. Before continuing with the background of this case, we need to make a brief digression to discuss the sentence imposed by the district court.

It is perfectly clear that the district court sentenced Santana-Madera to 324 months' imprisonment, but the internal architecture of the sentence is not so clear. The written judgment of the district court stated, "324 months, consisting of 324 months on Counts 4, 10 [cocaine distribution counts] & 11 [CCE count] and 240 months on *each of* [emphasis added] Counts 2, 3, 5, 6, 8, & 9 [cocaine distribution counts], all to be served concurrently."[1]

---

[1] The district court determined that the conspiracy charge, for sentencing purposes, was a lesser included offense of the CCE count and subsumed that count within the CCE count.

The use of the words "each of" with respect to counts 2, 3, 5, 6, 8 and 9, and the absence of that phrase in connection with counts 4, 10 and 11, suggests that the district court merged the two distribution offenses (counts 4 and 10) within the CCE count (count 11) and issued a single sentence of 324 months on the merged CCE offense. This is peculiar because the Sentencing Guidelines make no provision for such a merger of offenses. Rather, the Guidelines for sentencing on multiple counts of conviction require a sentencing court to impose a separate sentence on each count of conviction. U.S.S.G. § 5G1.2 (1993). In a case such as this, a sentencing court is instructed to impose the total punishment level on the count carrying the highest statutory maximum, and *then* impose concurrent sentences on the remaining counts. U.S.S.G. § 5G1.2(c) (1993).

Although we would ordinarily be inclined to believe that the district court followed the Sentencing Guidelines, those closest to this case—the Petitioner and the government—agree that the district court did not impose concurrent sentences of 324 months on counts 4 and 10. The government states that all eight of Santana-Madera's cocaine distribution offenses fell under the rubric of 21 U.S.C. § 841(b)(1)(C), and each carries a maximum sentence of 20 years. Therefore, the district court could have imposed only a sentence of 240 months on counts 4 and 10, just as it did with the six other cocaine distribution counts.

For his part, Petitioner agrees that the district court "did not sentence [him] for the § 848 [the CCE offense] conviction separately, but instead lumped Counts 4 and 10 (possession with intent to distribute) and 11 (CCE) together." The parties thus agree that the district court merged Counts 4 and 10 into the CCE count, and neither has argued, on direct appeal or in this *habeas* proceeding, that such a merger was improper. In any event, 324

months was an appropriate sentence on the CCE count. So, while we cannot help but wonder why the district court elected to sentence Santana-Madera in this manner, we have no more cause to discuss it here.

After sentencing, Santana-Madera appealed and this Court affirmed. *United States v. Santana-Madera*, 47 F.3d 1157 (2d Cir. 1995) (table). Santana-Madera did not contest the CCE jury instruction in that appeal. In July 1998, Santana-Madera returned to the district court (McCurn, *J.*) to file a petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2255. The district court denied the petition in January 1999, finding that it was time-barred and, in any event, that Petitioner's claims were not cognizable because the claims had either been raised and rejected on direct appeal, or lacked any showing of cause for the omission or resulting prejudice.

Petitioner filed a notice of appeal, which this Court construed as a motion for a certificate of appealability ("COA"). While that COA motion was pending, the Supreme Court decided *Richardson*, which interpreted the CCE statute. *Richardson* held that § 848's phrase "continuing series of violations" did not refer to a single element of the CCE offense, but rather to several elements. 526 U.S. at 818-19. Therefore, in a CCE case, the jury must unanimously and separately agree on each of the violations that constitute a "continuing series of violations" required for a CCE conviction. *Id.* at 824. Petitioner promptly amended his motion for a COA, raising the *Richardson* issue.

In May 2000, this Court granted a COA on the following issues: "(1) whether the decision in *Richardson v. United States*, 526 U.S. 813 (1999), should be applied retroactively; (2) if so, whether trial counsel is ineffective for failing to request the jury instructions required by *Richardson* where the direct appeal was decided prior to the *Richardson* decision; and (3) if so, whether harm-

less error analysis is applicable such that *habeas* relief is not appropriate."

In June 2000, the Supreme Court decided *Apprendi*, further complicating matters. *Apprendi* held that any fact other than a prior conviction that increases a defendant's sentence beyond the otherwise applicable maximum penalty must be decided by a jury beyond a reasonable doubt. 530 U.S. at 490. Petitioner again moved to amend his COA to allow him to raise *Apprendi* issues. This Court granted that motion in March 2001, allowing Petitioner to raise the issues: (1) whether *Apprendi* applies retroactively; and (2) if so, whether there was an *Apprendi* error in this case.

DISCUSSION

We review a district court's denial of a *habeas* petition *de novo*. *Farrington v. Senkowski*, 214 F.3d 237, 240 (2d Cir. 2000). Having reviewed all of the questions certified for appeal, we now affirm the judgment of the district court.

I. *Retroactivity of* Richardson

Whether or not a new rule of law announced by the Supreme Court is to be applied retroactively in criminal cases on *habeas* review for the first time[2] depends largely on whether the rule is substantive or procedural. It is axiomatic that, with limited exceptions "new constitutional rules of criminal procedure will not be appli-

---

[2] The Supreme Court recently held in *Tyler v. Cain*, 121 S.Ct. 2478 (2001), that, in the context of *second or successive habeas* petitions, 28 U.S.C. § 2244(b)(2)(A) mandates that only the Supreme Court, through a specific holding that a new rule is retroactive, can give a new rule retroactive applicability. *Tyler* does not alter the analysis of this case because this is Petitioner's first *habeas* petition and § 2244(b) governs only successive *habeas* petitions.

cable to those cases which have become final before new rules are announced." *Teague v. Lane*, 489 U.S. 288, 310 (1989) (plurality opinion). However, the *Teague* bar to retroactivity applies only to new procedural rules; new rules of substantive criminal law are presumptively retroactive. *United States v. Mandanici*, 205 F.3d 519, 525 (2d Cir. 2000). The Supreme Court has instructed that new rules are substantive when they alter "the meaning of a criminal statute enacted by Congress" such that the defendant stands convicted for conduct that may no longer be illegal. *Bousley v. United States*, 523 U.S. 614, 620 (1998); *accord Blizerian v. United States*, 127 F.3d 237, 242 (2d Cir. 1997).

Unquestionably, *Richardson* created a new rule. A case announces a new rule "when it breaks new ground or imposes a new obligation on the States or the Federal Government" or "if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague*, 489 U.S. at 301 (emphasis omitted). *Richardson*'s recent holding that a jury must unanimously agree on the actions that comprise the "continuing series of violations" was not dictated by precedent by the time Santana-Madera's conviction became final in 1995. But is the new rule substantive or procedural?

Neither the Supreme Court nor this Court has yet ruled on the question. However, nearly every court to confront it has concluded that the *Richardson* rule is substantive and, therefore, *Teague* analysis is inapplicable. *United States v. Lopez*, 248 F.3d 427, 432 (5th Cir. 2001) ("We find, however, that *Teague* is inapplicable, because *Richardson* consisted of the Supreme Court's interpretation of a statute and is therefore retroactively available on collateral review."); *Lanier v. United States*, 220 F.3d 833, 838 (7th Cir. 2000); *Murr v. United States*, 200 F.3d 895, 906 (6th Cir. 2000); *Monsanto v. United States*, 143

F. Supp. 2d 273, 279 (S.D.N.Y. 2001); *Benevento v. United States*, 81 F. Supp. 2d 490, 493 (S.D.N.Y. 2000). *But see Rice v. United States*, 118 F. Supp. 2d 451, 452 (S.D.N.Y. 2000) ("*Richardson* merely affects the procedure under which juries review the 'continuing series' element of the CCE statute.").

We conclude, agreeing with our sister circuits, that the *Richardson* rule is substantive, and therefore should be applied retroactively in a defendant's first federal *habeas* proceeding. In *Richardson*, the Supreme Court framed its task as follows: "In this case, we must decide whether the statute's phrase 'series of violations' refers to one element, namely a 'series,' in respect to which the 'violations' constitute the underlying brute facts or means, or whether those words create several elements, namely the several 'violations,' in respect to *each* of which the jury must agree unanimously and separately." *Richardson*, 526 U.S. at 817-18 (emphasis in original). By deciding that the jury had to agree unanimously on each of the offenses comprising the "continuing series" in a CCE count, *Richardson* interpreted a federal criminal statute and, in doing so, changed the elements of the CCE offense. In other words, it altered the meaning of the substantive criminal law. *Bousley*, 523 U.S. at 620.

II. *Applicability of Harmless Error Review*

Of course, a holding that *Richardson* applies retroactively to Petitioner's case does not alone suffice to vacate his CCE conviction. We must next consider whether the district court's instructional error was of sufficient magnitude to justify issuance of the writ without regard to prejudice, or whether it may be subjected to a harmless error review.

There is a limited class of errors—so-called "structural errors"—that are so serious as to defy harmless error analysis. *Arizona v. Fulminante*, 499 U.S. 279,

309-10 (1991). A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Id.* at 310. Errors meeting these criteria are *per se* prejudicial and require that the underlying conviction be vacated. *Neder v. United States*, 527 U.S. 1, 8-9 (1999).

Petitioner argues that the district court's failure to instruct the jury to agree separately on each of the offenses that comprised the "continuing series" amounts to a structural error. However, the weight of authority is to the contrary.

An erroneous instruction that omits an element of an offense is generally subject to harmless error analysis. *Id.* at 9. In *Neder*, the Supreme Court held that omitting an essential element from a jury charge "differs markedly from the constitutional violations we have found to defy harmless-error review." *Id.* at 8. Such omissions "do[ ] not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9 (emphasis in original). Furthermore, our sister circuits have, thus far, unanimously held that harmless error review applies to *Richardson* errors. *Lanier*, 220 F.3d at 838-39; *United States v. Brown*, 202 F.3d 691, 699 (4th Cir. 2000); *United States v. Escobar-de Jesus*, 187 F.3d 148, 161-62 (1st Cir. 1999). We agree that *Richardson* errors are not structural and are subject to harmless error review. But there is also a disagreement between the parties over the appropriate standard of harmlessness.

III. *Harmless Error Analysis*

Generally, when evaluating presumptively correct convictions on collateral *habeas* review, the harmless error inquiry for errors of a constitutional dimension is "whether the error 'had substantial and injurious effect or influence in determining the jury's verdict.' " *Brecht*

v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). The government argues that the instructional error in this case should be evaluated under the *Brecht* standard. Petitioner, on the other hand, argues that the rationale animating the stringent *Brecht* standard—the government's legitimate interest in the finality of convictions that have survived direct review—is undermined when no court has previously adjudicated the harmlessness of the error (presumably on direct appeal in state courts). He urges us to consider his claim under the somewhat more relaxed standard from *Chapman v. California*, 386 U.S. 18 (1967). Under that inquiry, "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24.

Neither the Supreme Court nor this Court has definitively established the proper harmless error standard to apply when a constitutional error is being evaluated for the first time on collateral review. And other courts addressing this issue are not in complete agreement. *Compare Bains v. Cambra*, 204 F.3d 964, 976-77 (9th Cir. 2000) (*Brecht* applies regardless of whether the error was ever evaluated under *Chapman*) *with Orndorff v. Lockhart*, 998 F.2d 1426, 1429-30 (8th Cir. 1993) (*Chapman* applies when no court has previously evaluated the harmlessness of the error). However, this case does not require us to settle the question. We conclude that, under either standard, the *Richardson* error of which Petitioner complains was clearly harmless.

The *Richardson* error occurred when the district court failed to require the jury to specifically and separately agree on each of the three violations that comprised the "continuing series of violations" required for a CCE con-

viction.[3] However, in addition to the CCE count, the jury also convicted Santana-Madera of no less than eight substantive counts of cocaine distribution and a single count of conspiracy to distribute cocaine. Thus, the jury unanimously agreed on at least nine major violations of the federal drug laws, any three of which are sufficient to establish the "continuing series of violations" under *Richardson* and § 848. *See Brown*, 202 F.3d at 699; *Escobar-de Jesus*, 187 F.3d at 162; *United States v. Long*, 190 F.3d at 476 n.3 (6th Cir. 1999). So, if the district court were clairvoyant and had given the jury the instruction required by *Richardson*, it is beyond cavil that the jurors would have unanimously agreed on three predicate violations of the drug laws. They unanimously agreed on nine such violations. The error here—even under the *Chapman* standard—is clearly harmless.[4]

---

[3] Santana-Madera argues that *Richardson* requires not only that a jury unanimously agree on three predicate violations, but also that it find that each predicate violation was undertaken in concert with five or more other persons. *Richardson*, however, imposed no such requirement. In fact, the *Richardson* majority specifically rejected this argument. *Richardson*, 526 U.S. at 823 ("To the extent the dissent suggests that [the element of the involvement of five or more people] must be satisfied with respect to *each* underlying crime, it is clearly wrong.").

This disposes of Petitioner's argument, relying on *United States v. Tran*, 234 F.3d 798 (2d Cir. 2000), (belatedly made in his reply brief) that the CCE count of his indictment failed to charge an offense. The indictment alleged that Santana-Madera supervised five or more people in the commission of three or more of the nine violations of the drug laws listed in the indictment. The indictment thus alleged all the elements of the CCE offense, 21 U.S.C. § 848, even after *Richardson*.

[4] Our conclusion that the *Richardson* error was harmless also disposes of Petitioner's argument that the failure of his trial and appellate counsel to raise the *Richardson* error constituted ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668,

IV. Apprendi *Issues*

Petitioner has a second set of arguments, based on *Apprendi*, that the sentence imposed by the district court is infirm. *Apprendi*, it will be recalled, held that, any fact, except a prior conviction, "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. To date, the Supreme Court has not offered any guidance on whether *Apprendi* has retroactive application to cases on collateral review. And this Court has not yet ventured where the Supreme Court has thus far feared to tread. Fortunately, we can resolve this case without blazing new trails, because our recent precedents conclusively demonstrate that there simply was no *Apprendi* error in Petitioner's sentence.

As we discussed above, Petitioner was sentenced to 324 months' imprisonment on the CCE count (with two substantive cocaine distribution counts merged within it), and to 240 months' imprisonment on each of the remaining six distribution counts, with all sentences to be served concurrently. Petitioner argues that, under *Apprendi*, the district court's findings as to the quantity of cocaine involved and other facts that increased the sentencing range required by the Guidelines had to be submitted to the jury and proved beyond a reasonable doubt.

Petitioner's invocation of *Apprendi* is unavailing. This Court has held that "*Apprendi* is inapplicable to Guidelines calculations that do not result in a sentence on a single count above the statutory maximum for that

---

687 (1984). Even if the performance of counsel was deficient, Petitioner cannot establish a reasonable probability that, but for his lawyer's failure to request a *Richardson* instruction, the outcome of the proceeding would have been different. *Id.*

count." *United States v. McLeod*, 251 F.3d 78, 82 (2d Cir. 2001); *accord United States v. Garcia*, 240 F.3d 180, 183 (2d Cir. 2001) (*Apprendi* does not alter "a sentencing judge's traditional authority to determine those facts relevant to selection of an appropriate sentence within the statutory maximum"). The CCE statute provides for a maximum sentence of life imprisonment. 21 U.S.C. § 848(a). Because Petitioner's sentence of 324 months is less than life, there is no *Apprendi* error in the sentence on this count. To be sure, the district court's findings increased the sentence required by the Guidelines, but the *Apprendi* rule is implicated only when such facts increase the *statutory* maximum sentence. *McLeod*, 251 F.3d at 82.

The concurrent sentences of 240 months on each of the six remaining drug distribution counts are similarly unassailable because those sentences did not exceed the statutory maximum term of imprisonment of 20 years provided by § 841(b)(1)(C) for cases involving the distribution of an unspecified amount of cocaine.[5] 21 U.S.C § 841(b)(1)(C). Thus, we find no error in Petitioner's sentence.

CONCLUSION

We have considered all of the parties' remaining contentions and find them to be without merit. For the foregoing reasons, we AFFIRM the decision of the district court.

---

[5] Because Petitioner's eight cocaine distribution convictions all fell under 21 U.S.C. § 841(b)(1)(C), his reply brief argument that the failure to allege drug quantity in the indictment is error under *Tran*, 234 F.3d 798, also fails. Section 841(b)(1)(C) covers distribution of unspecified amounts of cocaine. Thus, allegations of distribution of cocaine or possession with intent to distribute cocaine are sufficient to state a complete offense under that statute.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 99-2125
Filed May 4, 2000

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the fourth Day of May, Two thousand.

Present:

Hon. Ellsworth Van Graafeiland,*
Hon. Sonia Sotomayor,
Hon. Robert A. Katzmann,
Circuit Judges.

---

* Judge Van Graafeiland, who was originally assigned as a member of the panel designated to hear this motion, became ill shortly before the scheduled oral argument and was unable to participate in its argument or disposition. The remaining two members of the panel, who agree on the disposition, issue this order pursuant to 2d Cir. R. § 0.14(a), (b). See Murray v. National Broadcasting Co., Inc., 35 F.3d 45, 47-48 (2d Cir. 1994).

LEONARDO SANTANA-MADERA,

Petitioner-Appellant,

—v.—

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appellant has filed, *pro se*, motions seeking a certificate of appealability, *in forma pauperis* status and to "supplement the appeal." Upon due consideration, it is ORDERED that the motions are granted on the following limited issues: (1) whether the decision in *Richardson v. United States*, 526 U.S. 813 (1999), should be applied retroactively; (2) if so, whether trial counsel is ineffective for failing to request the jury instructions required by *Richardson* where the direct appeal was decided prior to the *Richardson* decision; and (3) if so, whether harmless error analysis is applicable such that habeas relief is not appropriate. Further, counsel will be appointed and a scheduling order will thereafter be issued.

FOR THE COURT:

Roseann B. MacKechnie, Clerk

By: LUCILLE CARR

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Filed October 6, 2000
Docket No. 99-2125

LEONARDO SANTANA-MADERA

—v.—

UNITED STATES OF AMERICA

MOTION INFORMATION FORM

Motion for the expansion of the Certificate of Appealability

MOTION BY: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Jeremy G. Epstein
Shearman & Sterling
599 Lexington Avenue
New York, NY 10022-6069
(212) 848-4169

OPPOSING COUNSEL: *(Name, address and tel. no. of law firm and of attorney in charge of case)*

Has consent of opposing counsel:

A. been sought?	☐ Yes	☒ No
B. been obtained?	☐ Yes	☒ No
Has service been effected?	☒ Yes	☐ No
Is oral argument desired? *(Substantive motions only)*	☐ Yes	☒ No

Requested return date: _____
(See Second Circuit Rule 27(b).)

Has argument date of appeal been set:

A. by scheduling order?	☒ Yes	☐ No
B. by firm date/argument notice?	☐ Yes	☐ No

C. If yes, enter date: October 20, 2000

EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL

Has request for relief been made below? *(See F.R.A.P. Rule 8)*	☐ Yes	☐ No
Any previous request for similar relief made to the 2nd Circuit?	☐ Yes	☐ No

Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No

If no, explain why not:

Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed:
Judge McCurn of the United States District Court for the Northern District of New York

Brief statement of the relief requested:
Expansion of the Certificate of Appealability

/s/ JEREMY G. EPSTEIN
By: *(Signature of Attorney)*

Signed name must be printed beneath.
Jeremy G. Epstein

Date: October 6, 2000

Leonardo Santana-Madera
Appearing for: *(Name of Party)*

Appellant or Petitioner: ☐ Plaintiff ☐ Defendant

Appellee or Respondent: ☐ Plaintiff ☐ Defendant

ORDER

Before:

Hon. Sonia Sotomayor, Hon. Robert A. Katzmann, Circuit Judges.*

IT IS HEREBY ORDERED that the motion be GRANTED.

Date: March 22, 2001

ROSEANN B. MACKECHNIE, CLERK

By:
/s/ BETH J. MEADOR
Beth J. Meador, Administrative Attorney

---

* The Hon. Ellsworth A. Van Graafeiland withdrew from this panel due to illness and did not participate in this decision.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

98-CV-1062
92-CR-245

Filed January 19, 1999

LEONARDO SANTANA-MADERA,

Petitioner,

—v—

UNITED STATES OF AMERICA,

Respondent.

APPEARANCES: OF COUNSEL:

LEONARDO SANTANA-MADERA
Petitioner, Pro Se
04629-052
FCI Schuylkill
P.O. Box 759
Minersville, PA 17954-0759

HON. THOMAS J. MARONEY
United States Attorney
Attorney for Respondent
P.O. Box 7198
Syracuse, NY 13261-7198

JOHN G. DUNCAN
Assistant U.S. Attorney

NEAL P. MCCURN, S.J.

MEMORANDUM-DECISION AND ORDER

Petitioner Leonardo Santana-Madera was found guilty after a jury trial on all counts of an indictment charging him with violation of 21 U.S.C. § 846, 21 U.S.C. § 841(a)(1), 18 U.S.C. § 2, and 21 U.S.C. § 848. Petitioner on October 12, 1993, was sentenced by this court to 324 months. Petitioner appealed the judgment of conviction on October 14, 1993, and on January 30, 1995, the judgment was affirmed by the Second Circuit Court of Appeals.

On December 6, 1995, petitioner filed a motion seeking permission to enter his appearances *pro se* in place of his court appointed attorney and transfer of his case file from said attorney to petitioner. On February 14, 1996, this motion was granted. Concurrent with that motion petitioner filed on December 6, 1995, a motion pursuant to 18 U.S.C. § 3582(c)(2) and § 1B1.10 of the Guidelines for a reduction of sentence. On February 13, 1996, this court denied said motion.

On May 29, 1998, petitioner filed a 28 U.S.C. § 2255 motion for leave to file a second or successive motion to vacate, set aside, or correct his sentence. The Second Circuit Court of Appeals denied this motion as unnecessary holding that since his December 6, 1995, motion was not pursuant to section 2255, a certificate by that court was not required.

On July 2, 1998, petitioner filed the instant motion pursuant to 28 U.S.C. § 2255 seeking to vacate, set aside, or correct his sentence by this court. In this motion petitioner posits that *Rutledge v. United States*, 517 U.S. 292, 116 S.Ct. 1241, 134 L.Ed.2d 419 (March 27, 1996), sets forth a new rule of law applicable to his claim herein and accordingly, the one-year period of time lim-

itation on a section 2255 motion provided for by the AEDPA, codified 28 U.S.C. § 2255, does not apply to him herein.

STATEMENT OF ISSUES BEFORE THE COURT

1. Whether petitioner is barred by procedural limitations from filing a 28 U.S.C. § 2255 motion 434 days after the effective date of the AEDPA.

2. Whether petitioner is precluded from raising the instant claims under 28 U.S.C. § 2255 where petitioner either previously litigated the same issues or failed to address them altogether on direct appeal.

I. Is Petitioner Barred from Filing a Section 2255 Motion 434 Days after the Effective Date of the AEDPA?

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") effective April 24, 1996, sets forth a one-year limitation on 28 U.S.C. § 2255. This one-year limitation runs from the latest of:

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the supreme Court, if that right has been newly recognized by the supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence. 28 U.S.C. § 2255 (1998).

The Second Circuit in *Reyes v. Keane*, 96 F.3d 676 (1996), concluded that the AEDPA's one-year limitation provision was not intended to apply retroactively to persons whose section 2254 petitions had been filed before the effective date of the Act, April 24, 1996. "*See Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997) (AEDPA's amendments to Title 28, chapter 153, which includes the new limitations provision for the filing of section 2254 petitions and section 2255 motions 'generally applied only to cases filed after the Act became effective'), *Ross v. Artuz*, 150 F.3d 97, 99."

As to petitions filed subsequent to the enactment of the AEDPA, as was Santana-Madera's in this case, the Second Circuit in *Artuz* has clarified its prior holding in *Peterson v. Demski*, 107 F.3d 92 (2d Cir. 1997), which had been interpreted by district courts in this circuit to bar habeas petitions not filed "within a reasonable time" after April 24, 1996, rather than adopting a strict one-year limitation. In *Artuz* Circuit Judge Kearse observed that the language therein which had been utilized by district courts to support their holdings that a full one year need not be granted to a petitioner, was dictum.

> "In the light of hindsight we order that dictum should not be followed, given the lack of guideline to prisoners and to the district court."

Ross v. Artuz, 150 F.3d 97, 101 (2d Cir. 1998).

Judge Kearse went on to say:

> "When a statute of limitations is measured in years, the last date for instituting the action is the anniver-

> sary date of the start of the limitation's period (citations omitted). Our adoption of the grace period of one year means that petitions filed pursuant to section 2254 and motions filed pursuant to section 2255 are barred by the statute of limitations established by the AEDPA as filed on or before April 24, 1997."

Santana-Madera's petition here was filed on July 2, 1998, 434 days after the effective date of the AEDPA and accordingly must be dismissed.

Santana-Madera cites *Rutledge v. United states*, 517 U.S. 292, 226 S.Ct. 1241, 134 L.Ed. 419 (1996) as applicable to his case and urges that the legal and factual scenario set forth therein as grounds for overcoming the one-year limitation period in his case. Application of *Rutledge*, however, would do no more for movant than require him to file his motion by March 27, 1997, one year following that decision. Again, not within the one-year time limitation.

The movant in his Reply to the Government's Response seeks to overcome his failure to file within the one-year time limitation of the AEDPA by reason of alleged impairment imposed upon him by the failure of his court appointed counsel to turn over portions of his case file to him. (See Order, McCurn, J., Feb. 13, 1996, and various correspondence between the court, Santana-Madera, pro se attorney, and FOIA attorney, Department of Justice, attached to Santana-Madera's Reply papers). The movant argues that failure of his attorney to turn over his complete file as of September 5, 1996, and that the failure of the United States Justice Department to comply with his FOIA request up until May, 1997, impeded his ability "to obtain Appellate and/or Appellate Resolution."

Of course, Santana-Madera did obtain "Appellate and/or Appellate Resolution" on his direct appeal of the judg-

ment of conviction which was affirmed by the Second Circuit on January 4, 1995, over one year prior to his requests for additional file materials from his attorney and the United States Department of Justice. If it is his position that such deprivation precluded him from preparation and filing a timely section 2255 motion in compliance with the one-year limitation provided for in the AEDPA, his allegation of same suffers the defect of failing to particularize just what materials he was deprived of, how those materials were relevant to presentation of his section 2255 claim herein, and how he was prejudiced by failure to obtain same.

The case law relied upon by Santana-Madera in his Reply fails to support his legal conclusions and his position that the alleged delay overcomes his failure to timely file this section 2255 motion. *Burkett v. Cunningham*, 826 F2d 1208 (3rd Cir. 1987); *Codispoti v. Howard*, 589 F2d 135 (3rd Cir. 1978); *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980); *Burkett v. Fulcomer*, 951 F2d 1431 (3d Cir. 1991) dealt with delay occasioned by state court proceedings-due process violations which effected prisoner's rights to an effective appeal of judgments of conviction. The movant here brings nothing to this court's attention which would have a bearing on his failure to comply with the procedural requirements of the AEDPA in filing this section 2255 motion.

In any event, as set forth by the Government in its Brief in Opposition, the five grounds which Santana-Madera raises in support of this motion, i.e., double jeopardy, subject matter jurisdiction, erroneous jury instructions, ineffective assistance of counsel, and role in the offense (Sentencing Guidelines) were, or could have been, raised on his direct appeal. Failure to do so therein precludes a second bite of the apple in this motion. As set forth by the United States in its Response in Opposition:

> A § 2255 motion may not relitigate issues that were raised and considered on direct appeal. *Riascoc-Prado v. United States*, 66 F.3d 30, 33 (2d Cir. 1995); *Cabrera v. United States*, 972 F.2d 23, 25 (2d Cir. 1992). Furthermore, it is well established that "[a] defendant is also barred from raising claims in his § 2255 motion that he failed to raise on direct appeal unless he shows cause for the omission and prejudice resulting therefrom." *Perez, supra*, 129 F.3d at 260 (citing *Femia v. United States*, 47 F.3d 519, 524 (2d Cir. 1995)). Govt's. Response at p.7.

The United States in its Response in Opposition has convincingly treated these issues at pp. 7-11, and the court adopts the factual and legal arguments contained therein.

Accordingly, Santana-Madera having failed to file his section 2255 motion before the expiration of the one-year limitation period required by the AEDPA is procedurally barred from seeking the relief sought herein. Further, the court holds that the claims set forth therein, even if not procedurally barred, are not cognizable here as the same were raised and considered on direct appeal or if not, movant has not shown cause for the omission and prejudice resulting therefrom. The motion is DENIED.

IT IS SO ORDERED.

DATED: January 13, 1999
Syracuse, New York

/s/ NEAL P. MCCURN
Neal P. McCurn
Senior U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

Criminal Action No.
92-CR-245

Superseding Indictment
VIO: 21 U.S.C. § 841
21 U.S.C. § 846
21 U.S.C. § 848
[11 COUNTS]

UNITED STATES OF AMERICA,

—v.—

LEONARDO SANTANA-MADERA, A/K/A JULIO; RAPHAEL SANTANA, A/K/A TONY LOPEZ; LIGIA MIGUELINA MADERA, GRISELA SANTANA, A/K/A GIGI SANCHEZ; JOSE OSCAR FERMIN-DILONE, A/K/A REGGIE; FRANKLYN GONZALEZ-DIAZ, A/K/A GRINGO; JEFFREY BUDGE; THEODORE KRAWIEC,

Defendants.

THE GRAND JURY CHARGES:

COUNT I

From about January of 1986, the exact date being unknown to the grand jury, up to and including on or about June 19, 1992 in the Northern District of New York and elsewhere, the defendants,

LEONARDO SANTANA-MADERA, a/k/a Julio;

RAPHAEL SANTANA, a/k/a Tony Lopez;

LIGIA MIGUELINA MADERA,

GRISELA SANTANA, A/K/A GIGI SANCHEZ;

JOSE OSCAR FERMIN-DILONE, A/K/A REGGIE;

FRANKLYN GONZALEZ-DIAZ, A/K/A GRINGO;

JEFFREY BUDGE;

THEODORE KRAWIEC

did knowingly and intentionally combine, conspire, confederate and agree, together with each other and with other persons, both known and unknown to the grand jury, to commit the following offense against the United States: knowing and intentional distribution of and possession with intent to distribute cocaine, a Schedule II controlled substance in violation of Title 21, United States Code, Section 841(a)(1).

MANNER AND METHODS

1. As part of the conspiracy, defendant LEONARDO SANTANA-MADERA, a/k/a Julio, organized, led, ran, directed, supervised and managed a group of persons who distributed cocaine, which included RAPHAEL SANTANA, a/k/a Tony Lopez and LIGIA MIGUELINA

MADERA, JOSE OSCAR FERMIN-DILONE, A/K/A REGGIE; FRANKLYN GONZALEZ-DIAZ, A/K/A GRINGO; JEFFREY BUDGE; THEODORE KRAWIEC, and others known and unknown to the grand jury.

2. As part of the conspiracy, defendant GRISELA SANTANA, A/K/A GIGI SANCHEZ, also organized, led, ran, directed, supervised, managed a group of persons who distributed cocaine which included RAPHAEL SANTANA, a/k/a Tony Lopez and LIGIA MIGUELINA MADERA, JOSE OSCAR FERMIN-DILONE, A/K/A REGGIE; FRANKLYN GONZALEZ-DIAZ, A/K/A GRINGO; JEFFREY BUDGE; THEODORE KRAWIEC.

3. It was further part of the conspiracy that defendant LEONARDO SANTANA-MADERA, a/k/a Julio, brought, and caused others to bring, cocaine from the New York City area for redistribution in the Syracuse, New York area.

4. It was further part of the conspiracy that defendant GRISELA SANTANA, A/K/A GIGI SANCHEZ, brought and caused others to bring cocaine from the New York City area for re-distribution in the Syracuse, New York area.

5. It was further part of the conspiracy that defendant LIGIA MIGUELINA MADERA brought cocaine from the New York City area for redistribution in the Syracuse, New York area.

6. It was further part of the conspiracy that defendant FRANKLYN GONZALES-DIAZ, A/K/A GRINGO, brought cocaine from the New York City area for redistribution in the Syracuse, New York area.

7. It was further part of the conspiracy that defendant THEODORE KRAWIEC assisted others, known and unknown to the grand jury, in delivering cocaine from

the New York City area to residences in the Syracuse, New York area for redistribution.

8. It was further part of the conspiracy that the above-named defendants and others used several residences including 419 South Alvord Street and 112 South Alvord Street, Syracuse, New York from which to sell cocaine.

9. It was further part of the conspiracy that defendants LEONARDO SANTANA-MADERA, a/k/a Julio, RAPHAEL SANTANA, a/k/a Tony Lopez and LIGIA MIGUELINA MADERA, JOSE OSCAR FERMIN-DILONE, A/K/A REGGIE; FRANKLYN GONZALEZ-DIAZ, A/K/A GRINGO; JEFFREY BUDGE; THEODORE KRAWIEC and others known and unknown to the grand jury possessed and aided and abetted each other to possess cocaine with the intent to distribute it.

All in violation of Title 21, United States Code, Section 846 and Title 18, United States, Section 2.

COUNT II

On or about May 6, 1992, in the Northern District of New York, defendant LEONARDO SANTANA-MADERA, a/k/a Julio, knowingly and intentionally distributed and possessed with intent to distribute cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT III

On or about May 8, 1992, in the Northern District of New York, defendants LEONARDO SANTANA-MADERA, a/k/a Julio and RAPHAEL SANTANA, a/k/a Tony Lopez aiding and abetting each other knowingly and inten-

tionally distributed and possessed with intent to distribute cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT IV

On or about May 13, 1992, in the Northern District of New York, defendant LEONARDO SANTANA-MADERA, A/K/A JULIO, knowingly and intentionally possessed with intent to distribute cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1).

COUNT V

On or about May 15, 1992, in the Northern District of New York, defendants LEONARDO SANTANA-MADERA, a/k/a Julio and RAPHAEL SANTANA, a/k/a Tony Lopez, aiding and abetting each other, knowingly and intentionally possessed with intent to distribute cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT VI

On or about May 27, 1992, in the Northern District of New York and elsewhere, defendants LEONARDO SANTANA-MADERA, A/K/A JULIO and JOSE OSCAR FERMAN-DILONE, A/K/A REGGIE, aiding and abetting each other, knowingly and intentionally possessed with intent to distribute cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT VII

On or about June 2, 1992, in the Northern District of New York, defendant JOSE OSCAR FERMIN-DILONE, A/K/A REGGIE, and LIGIA MIGUELINA MADERA, aiding and abetting each other, knowingly and intentionally possessed with intent to distribute cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT VIII

On or about June 8, 1992, in the Northern District of New York, defendant RAPHAEL SANTANA, a/k/a Tony Lopez, and LEONARDO SANTANA-MADERA, a/k/a Julio, acting together with and aiding and abetting each other, knowingly and intentionally distributed and possessed with intent to distribute cocaine, a Schedule H controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT IX

On or about June 11, 1992, in the Northern District of New York, defendants, LEONARDO SANTANA-MADERA, a/k/a Julio, and RAPHAEL SANTANA, a/k/a Tony Lopez, acting together with and aiding and abetting each other, knowingly and intentionally distributed and possessed with intent to distribute cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT X

On June 19, 1992, in the Northern District of New York, defendants, LEONARDO SANTANA-MADERA, a/k/a Julio, and RAPHAEL SANTANA, a/k/a Tony Lopez, acting together and aiding and abetting each other, knowingly and intentionally possessed with the intent to distribute cocaine, a Schedule II controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT XI

That from about January of 1986, the exact date being unknown to the grand jury, and continuing thereafter up to and including June 19, 1992 in the Northern District of New York and elsewhere,

LEONARDO SANTANA-MADERA, A/K/A JULIO

GRISELA SANTANA, A/K/A GIGI SANCHEZ

defendants herein, knowingly and intentionally did engage in a continuing Criminal Enterprise in that they did violate Title 21, United States Code, Sections 841 and 846 which violations were part of a continuing series of violations of said statutes undertaken by the said defendants in concert with at least five other persons, with respect to whom each defendant occupied a position of organizer, supervisor, or manager, which violations included three or more of the violations set forth in Counts I through X of this indictment, and from which continuing series of violations the defendants

obtained substantial income or resources, in violation of Title 21, United States Code, Section 848.

A TRUE BILL

JEROME F. OHRZYNSKI
FOREPERSON OF THE GRAND JURY

Gary L. Sharpe
United States Attorney

By: JOHN G. DUNCAN
John G. Duncan
Assistant U.S. Attorney

UNITED STATES CODE ANNOTATED
TITLE 21. FOOD AND DRUGS
CHAPTER 13—DRUG ABUSE PREVENTION AND CONTROL
SUBCHAPTER I—CONTROL AND ENFORCEMENT
PART D—OFFENSES AND PENALTIES

Current through P.L. 107-26, approved 8-17-01

§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams

or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the

sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-

[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at

least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior

conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

UNITED STATES CODE ANNOTATED
TITLE 21. FOOD AND DRUGS
CHAPTER 13—DRUG ABUSE PREVENTION AND CONTROL
SUBCHAPTER I—CONTROL AND ENFORCEMENT
PART D—OFFENSES AND PENALTIES

Current through P.L. 107-19, approved 7-10-01

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

UNITED STATES CODE ANNOTATED
TITLE 21. FOOD AND DRUGS
CHAPTER 13—DRUG ABUSE PREVENTION AND CONTROL
SUBCHAPTER I—CONTROL AND ENFORCEMENT
PART D—OFFENSES AND PENALTIES

Current through P. L. 107-19, approved 7-10-01

§ 848. Continuing criminal enterprise

(a) Penalties; forfeitures

Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title; except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 30 years and which may be up to life imprisonment, to a fine not to exceed the greater of twice the amount authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, and to the forfeiture prescribed in section 853 of this title.

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I—CRIMES
CHAPTER 1—GENERAL PROVISIONS

Current through P. L. 107-19, approved 7-10-01

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.